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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FRANK JAKUBAITIS,

Plaintiff and Appellant,

v.

DUYEN THI BUI et al.,

Defendants and Respondents.

G055662

(Super. Ct. No. 30-2014-00753384)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Frederick Paul Horn, Judge. Affirmed.

Frank Jakubaitis, in pro. per., for Plaintiff and Appellant.

The Chang Firm and Randy Chang for Defendants and Respondents.

Frank Jakubaitis appeals from the trial court's order granting a motion to vacate a default and default judgment against Duyen Thi Bui and Douglas Nguyen (collectively referred to as Respondents unless the context requires otherwise). The court determined because Jakubaitis failed to properly serve Respondents with the underlying lawsuit, the court lacked personal jurisdiction over Respondents and the default judgment entered against them was void. Jakubaitis first contends service was proper. Alternatively, he asserts Respondents' negligence in waiting nearly two years to challenge the default judgment waived any service defect. We find no error with the court's ruling and affirm the order.

FACTS

Jakubaitis and his wife, Tara,¹ rented a house (rental property) from Bui and her son, Nguyen. Jakubaitis alleged Nguyen promised to sell the rental property to Jakubaitis and Tara. Jakubaitis further asserted he moved into the rental property and made repairs to it in reliance on the promise to sell. Three months later, Nguyen informed Jakubaitis the rental property would not be for sale in the near future as his mother decided not to list the house. From there, Jakubaitis withheld rent for purported deductions for repairs and improvements to the rental property and was subsequently evicted.

Thereafter, Jakubaitis filed a complaint against Respondents, among others, alleging breach of contract, fraud, and conspiracy, and seeking a million dollars in damages. On October 29, 2014, at 3:30 p.m., Tara stated she served the summons on Randy Chang as agent for Bui, an attorney who previously represented Bui in a separate unlawful detainer proceeding. Chang's office was located at 7755 Center Avenue, Suite 1100 in Huntington Beach. Chang informed Tara he could not accept service on behalf

¹ We use Tara Jakubaitis's first name for clarity and intend no disrespect.

of Bui for the new lawsuit. Tara handed the summons and complaint in the direction of Chang, and walked away.

Because he found Tara's behavior disconcerting, Chang prepared a declaration about the incident the next day and filed it with the court shortly thereafter. Chang's declaration of non-service stated the following: "I am the attorney for . . . Bui, the plaintiff in the unlawful detainer action 30-2014-00745632-CL-UD-CJC lawsuit. . . . Bui is seeking possession of her home from Frank Jakubaitis for nonpayment of rents. [¶] . . . [¶] As of the date of this declaration, I do not represent . . . Bui in this instant lawsuit nor do I have the authority to accept service on her behalf."²

Jakubaitis also filed a proof of service indicating he served Nguyen at the rental property on December 2, 2014, between 8:30 and 9:00 p.m. The proof of service was dated March 17, 2015. The process server on the proof of service was listed as "R. Chone," whose address was listed as the Red Roof Inn in Santa Ana, had no listed telephone number, and was not registered as a process server.

A default judgment was entered in favor of Jakubaitis in May 2015. Respondents stated they first learned about the lawsuit when their bank notified them that their account had been levied. Upon learning of the levy, they hired Chang to represent them in this matter. On April 19, 2017, Respondents filed a claim of exemption and Jakubaitis requested a hearing on the exemption matter. The next day, Respondents filed a motion to vacate the judgment and declarations in support thereof. Nguyen stated he did not live at the rental property where he was purportedly served, he was not at the address at the time of the service, and he was never served with the summons and complaint.

² Jakubaitis does not argue Chang's declaration regarding non-service constituted a general appearance. Because Chang's declaration did not give notice of appearance for Bui or purport to answer Jakubaitis's complaint in any manner, the declaration did not constitute an appearance on behalf of Bui. (Code Civ. Proc., § 1014; see *Slaybaugh v. Superior Court* (1977) 70 Cal.App.3d 216, 221-222.)

The trial court granted the motion to vacate, stating, “The default judgment is vacated because service was improper and it is thus void.” The court went on to determine, “As between the person who claims to have effectuated service, who has not provided the court with a complete name, and the detailed declaration of defendant, the court finds defendant Nguyen to be more credible. Accordingly, the court finds Nguyen was not served with the summons and complaint.” As to service on Bui, the court determined the following: “[Jakubaitis] attempted to serve defendant Bui by serving the summons and complaint on attorney Chang, who represented Bui in the prior unlawful detainer matter between the parties. The parties disagree on the scope of Chang’s representation of Bui but [Jakubaitis] has no evidence that Chang was ever authorized to accept service of the summons and complaint in this case on behalf of Bui. It does not matter that legal filings from the prior unlawful detainer case could be served on Bui’s attorney. The initial service of the summons in this case needed to be according to statute absent an agreement that attorney Chang was authorized by Bui to accept service of the summons and complaint. As a result, the court finds Bui was not served with the summons and complaint.”

DISCUSSION

Respondents moved to set aside the default judgment on the grounds Jakubaitis failed to properly serve and obtain personal jurisdiction over them. After considering the affidavits filed in the case, the trial court determined service was not effectuated, granted Respondents’ motion, and vacated the judgment pursuant to Code of Civil Procedure section 473, subdivision (d).³ We find no error and affirm the court’s order.

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All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

I. Governing Law

“[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. [Citation.]” (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444.) A default judgment entered against a defendant that was not properly served is void. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1330-1331.) “Under section 473, subdivision (d), the court may set aside a default judgment which is valid on its face, but void, as a matter of law, due to improper service. [Citations.]’ [Citation.]” (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.)⁴

Service of process cannot be upheld solely on the ground the defendant received actual notice of the action when plaintiff failed to comply with statutory requirements for service. (*Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 414-415 (*Summers*) [fact improperly served summons and complaint were forwarded to defendant’s attorney who notified defendant of suit does not overcome defects in validity of service].) A registered process server’s return of process “establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return.” (Evid. Code § 647; *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.) Service upon a party’s agent with ostensible authority to accept service acquires jurisdiction over the party. (*Warner Bros. Records, Inc. v. Golden West Music Sales* (1974) 36 Cal.App.3d 1012, 1018-1019 (*Warner Bros.*)) “When a defendant challenges the court’s personal jurisdiction on the ground of improper service of process ‘the burden is on the plaintiff to prove the

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Jakubaitis notes there was an almost two-year delay between the entry of default judgment and respondents’ motion to vacate. When a default judgment is facially valid, but void for lack of service, any motion for relief must be made within two years of entry of judgment. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180.) Respondents met this time limit.

existence of jurisdiction by proving, inter alia, the facts requisite to an effective service.”
(*Summers, supra*, 140 Cal.App.4th at p. 413 fn. omitted.)

“We review de novo a trial court’s determination that a judgment is void.”
(*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496.) However, “where a plaintiff has contested a motion to vacate a default judgment by way of affidavits or other evidence that goes beyond the judgment roll as set forth in section 670, subdivision (a), of necessity our review goes beyond the judgment roll. [Citation.] In determining any issues raised by such evidentiary matters, our review is governed by the familiar abuse of discretion standard. [Citation.] That standard requires we defer to factual determinations made by the trial court when the evidence is in conflict, whether the evidence consists of oral testimony or declarations. [Citations.]” (*Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1440-1441 (*Ramos*).)

II. Purported Service on Nguyen

Jakubaitis submitted a return of service from a person identified as “R. Chone” in March 2015 indicating Nguyen was personally served at the rental property. Because Chone was not a registered process server, however, the facts stated in the return were not entitled to deference under Evidence Code section 647. Jakubaitis did not present a declaration from Chone supporting the service of process. In contrast, Nguyen submitted a detailed declaration stating he was at his home, not the rental property, at the time he was allegedly served. The trial court considered the evidence and made a credibility determination, crediting Nguyen’s declaration over an unlicensed process server’s return of service. Because the trial court discredited the service of summons on Nguyen, the court determined it had no personal jurisdiction over him. We will not reweigh the trial court’s credibility determination on appeal. (See *Ramos, supra*, 223 Cal.App.4th at pp. 1440-1441.)

Jakubaitis also contends Nguyen received actual notice of the lawsuit through Chang, as “[t]he relationship [between Chang and Respondents] was sufficiently

close enough that Chang apprised Respondents of service upon him of the action.”

Contrary to this assertion, Jakubaitis introduced no evidence to demonstrate the existence of an ostensible agency relationship between Chang and Nguyen. We find no error with the court’s determination the default judgment was void as to Nguyen.

III. Purported Service on Bui

Jakubaitis asserts Bui received actual notice of the lawsuit when the summons was served on Chang as her attorney and ostensible agent. There was no reason for Jakubaitis to believe Chang was the ostensible agent for Bui for this lawsuit. Indeed, Jakubaitis and Tara were both informed Chang had no authority to accept service on behalf of Bui, and Chang filed a declaration attesting to that fact.

Jakubaitis relies on *Warner Bros.* to support his position. We find *Warner Bros.* distinguishable. In *Warner Bros.*, service of process on the individual defendants’ attorney resulted in actual notice to the defendants. (*Warner Bros.*, *supra*, 36 Cal.App.3d at p. 1015.) The attorney in *Warner Bros.* was also a co-defendant in the case. (*Id.* at p. 1014.) “The nature of the services performed by [the attorney] for defendants and the necessity for his repeated communication with them in performing those services, made it ‘highly probable’ that defendants would receive actual notice of the service of process on [the attorney] upon their behalf.” (*Id.* at p. 1018.)

In contrast to *Warner Bros.*, here, Chang was not a co-defendant in the lawsuit brought by Jakubaitis. He only represented Bui in an unrelated unlawful detainer action in 2014, and did not have an ongoing attorney-client relationship with Respondents at the time of service. Jakubaitis presented no facts showing the necessity for repeated communication between Chang and Bui or how the nature of the previous unlawful detainer action would give rise to such a close and continuing relationship as to constitute ostensible agency. Furthermore, there was no evidence that Bui ultimately received actual notice of the lawsuit from Chang. Jakubaitis also failed to show Chang was specifically authorized to accept service of process on behalf of Bui, and Chang’s

declaration filed after service was made stated just the opposite. The trial court considered this issue of fact and determined, as follows: “The parties disagree on the scope of Chang’s representation of Bui but [Jakubaitis] has no evidence that Bui was ever authorized to accept service of the summons and complaint in this case on behalf of Bui.” Jakubaitis bore the burden to prove facts demonstrating effective service on Bui. He failed to carry this burden, and we find no error with the trial court’s order.

IV. Respondents Did Not Waive Their Claims of Defective Service

Jakubaitis argues Respondents waived their claims of defective service when their attorney made a general appearance on April 19, 2017, when he filed claims of exemption. On April 20, 2017, Chang filed Respondents’ motion to vacate the judgment.

Assuming without deciding Respondents’ postjudgment use of the exemption procedures constituted a general appearance in the action, such a postjudgment general appearance would not retroactively cure the service defect in the judgment. (*In re Marriage of Smith* (1982) 135 Cal.App.3d 543, 545.) Respondents were still entitled to seek relief by way of their motion to set aside the judgment. (*Id.* at p. 545.) Respondents did not waive their claims of defective service.

DISPOSITION

The trial court's order granting Respondents' motion to set aside the default judgment and vacate their entries of default and the judgment is affirmed. Respondents are awarded their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.